

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL, MINNESOTA

In the Matter of all Licenses Held by
Sonny's Bar, Inc., d/b/a/ Louie's Bar, for
the Premises Located at 883 Payne
Avenue, St. Paul, Minnesota. License ID
No. 16161; City File No. G95-0150.

FINDINGS OF FACT,

CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Friday, June 9, 1995 at the City Hall in St. Paul, Minnesota. The hearing was held pursuant to a Notice of Hearing dated May 15, 1995.

Janet Reiter, Assistant St. Paul City Attorney, Civil Division, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul (City). Louis A. Lentsch and Louis R. Lentsch, 883 Payne Avenue, St. Paul, Minnesota 55101, appeared on behalf of Sonny's Bar, Inc. (Licensee or Respondent). The record closed at the conclusion of the hearing on June 9, 1995.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the St. Paul City Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the City Council, which, after reviewing the record, may adopt, reject, or modify the Findings of Fact, Conclusions and Recommendation contained herein. The parties should contact Nancy Anderson, Council Secretary, St. Paul City Council, 310 City Hall, St. Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether one of Respondent's employees served alcoholic beverages to two person who were obviously intoxicated in violation Minn. Stat. § 340A.502 (1994); and if so, whether the Respondent's licenses should be suspended for a period of one day and the Respondent ordered to pay all costs associated with this proceeding.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Kristine Schweinler, also known as Kristine Van Horn, is a senior license inspector for the City of St. Paul. She is employed in the License Inspection and Environmental Protection (LIEP) division, where she has worked for the past 13 years.

2. Among other things, Schweinler is responsible for processing Class 3 license applications and enforcing laws relating to those licenses. Class 3 licenses are those, like liquor licenses, which can only be issued with City Council approval.

3. On the evening of March 9, 1995, Schweinler was engaged in making compliance checks on licensed liquor establishments which were the subject of complaints. At all times material to this proceeding, she was accompanied by two St. Paul police officers: Per Tredal and Eugene Polyak. Tredal is a sergeant assigned to a special investigations unit which deals with gambling, prostitution, liquor violations and pornography. Polyak is also a sergeant in the special investigation unit.

4. At approximately 10 p.m. on March 9, Schweinler, Tredal, and Polyak entered Louie's Bar at 883 Payne Avenue in St. Paul, Minnesota. Neither Tredal or Polyak were in uniform. Approximately six to ten patrons, a bartender and a bouncer were in the establishment when they entered.

5. After they entered the establishment, the three went to the back side of the bar and sat down. Polyak sat immediately to the right of a patron (Patron 1) who was already seated at the bar. Schweinler sat immediately to his right and Tredal sat immediately to Schweinler's right. Shortly after the three sat down, Schweinler went over to a pull-tab booth in the establishment to purchase some pull-tabs and determine if the operator was properly identified. She then returned to the same stool at the bar.

6. Patron 1 was ruffled and unkept. He was staring at Polyak after Polyak sat down at the bar, and eventually addressed Polyak in a slurred voice. He stated: "I hope you're not who I think you are." Polyak asked Patron 1 who he thought Polyak was. Patron 1 said that he thought he was the police. Polyak denied that he was a police officer. At that point, Patron 1 said it was good that Polyak was not a police officer because the police didn't belong in the bar. Patron 1 continued to stare at Polyak and eventually stated that he believed he had beaten the tar out of Polyak and two other police officers some time in the past. Polyak told him that he wasn't the police officer Patron 1 had beaten. Patron 1 said he hoped he wasn't because he'd hate to have to do the same thing again tonight. Patron 1 continued to talk. His conversation was irrational and jumped from one unusual subject to another.

7. When Polyak first sat down at the bar Patron 1 was drinking a beer. He subsequently ordered and drank a second beer and ordered a third beer. The bartender served these beers to him. While talking to Polyak, he belched several times. He appeared tired and intermittently rubbed his eyes. About the time Patron 1 ordered his third beer Polyak asked him if he didn't think he'd had enough to drink. Patron 1 asked Polyak how he could tell if he'd had too much to drink. Polyak ignored his comment. Thereafter, Patron 1 resumed staring at Polyak. Eventually, Polyak asked him to move. Patron 1 said that he had been at the bar three hours before Polyak arrived and told Polyak that he is the one that should move. Polyak told Patron

1 that he had more than enough to drink and that if he didn't move, Polyak would have him put in detox. Patron 1 stared at Polyak for a short while then moved to another booth with Patron 2. Patron 1 had difficulty getting off the bar stool when he moved to the booth.

8. Patron 2 was sitting beside Patron 1 when Schweinler, Tredal and Polyak first entered the bar. However, he did not remain there long and was moving around the bar during the 20 to 30 minutes that the three were there. Patron 2 staggered when he walked, had bloodshot eyes, and talked in a loud, irrational manner. When sitting at the bar, he intermittently nodded off. While the three investigators were in the bar, Tredal saw Patron 2 consume one rum and Coke. He ordered and was served two more by the bartender. Each drink contained approximately one ounce of rum.

9. Tredal, Schweinler, and Polyak each believed that Patrons 1 and 2 were intoxicated when the bartender was serving them. The bartender, named Jim, was moving around the bar waiting on customers while the three investigators were in the establishment. The bartender was usually in the middle of the bar approximately 15 feet from where the three investigators were seated. He was in a position to hear the conversations of Patrons 1 and 2 and observe their behavior.

10. Tredal and Polyak are experienced police officers. Tredal has been a police officer for twenty years; Polyak has 11 years experience. They have had training and experience identifying and dealing with intoxicated persons. Schweinler does alcohol awareness training for licensed liquor establishments on behalf of the City, and before she began her employment with the City, she had extensive experience working in establishments which served alcoholic beverages.

11. The three investigators remained in the establishment for approximately 20 to 30 minutes. Although they believed that Patrons 1 and 2 were intoxicated when served by the bartender, they did not advise the bartender of their opinion, instruct the bartender to stop serving them, or advise the bartender that any criminal or administrative citations would be issued.

12. On March 27, 1995, an assistant city attorney notified Mr. Louis A. Lentsch that the City might take adverse action against all the licenses held by Louie's Bar because its bartender had served alcoholic beverages to two patrons who were obviously intoxicated in violation of Minn. Stat. § 340A.502. The notice advised Mr. Lentsch that if he disputed the violations within ten days an administrative hearing would be scheduled. By letter dated April 3, 1995, Mr. Louis A. Lentsch requested a hearing.

13. On May 15, 1995, a hearing notice was served on Mr. Louis A. Lentsch, and a copy was filed with the Office of Administrative Hearings.

14. Patrons 1 and 2 were obviously intoxicated when the three City officials were in Louie's Bar on March 9 and were served alcoholic beverages by Respondent's bartender. The bartender, using usual and reasonable powers of observation knew or should have known that the two patrons were intoxicated when he served them in the officials' presence.

Based upon the forgoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The St. Paul City Council and the Administrative Law Judge have authority to consider the charges brought against Sonny's Bar, Inc. under Minn. Stat. §§ 14.55 and 340A.415 and §§ 310.05 and 310.06(b)(6)a of the St. Paul Legislative Code.

2. The Licensee received timely and appropriate notice of the charges against it and the time and place of the hearing.

3. The City has complied with all relevant substantive and procedural requirements of statute and rule.

4. Under Minn. Stat. § 340A.502 and § 409.08(12) of the St. Paul Legislative Code, no person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.

5. The Licensee violated Minn. Stat. § 340A.502 and § 409.08(12) of the St. Paul Legislative Code on March 9, 1995 when its bartender sold alcoholic beverages to two patrons who were obviously intoxicated.

6. The City has the burden of proof to establish, by a preponderance of the evidence, that the Licensee violated the statute and ordinances under which it has been cited.

7. Under § 409.08(5) of the St. Paul Legislative Code, the Licensee is responsible for the acts of its employees at its place of business.

8. Under the penalty matrix in § 409.26(b) of the St. Paul Legislative Code, a one-day suspension of the Licensee's licenses is presumptively appropriate for the offense charged.

9. Under § 310.05(k) of the St. Paul Legislative Code, the City Council may impose upon any licensee or license applicant some or all of the costs of a contested hearing before an independent hearing examiner. The costs of a contested hearing which may be imposed upon a licensee include, but are not limited to, the cost of the administrative law judge or independent hearing examiner, stenographic and recording costs, copying costs, city staff and attorney time for which adequate records have been kept, rental of rooms and equipment necessary for the hearing, and the cost of expert witnesses.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the licenses of Sonny's Bar, Inc. be suspended for one day.

Dated this 12th day of July, 1995

JON L. LUNDE
Administrative Law Judge

Reported: Taped: One Tape.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the City is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

I.

Licensee is charged with a violation of Minn. Stat. § 340A.502. The statute states:

No person may sell, give, furnish, or in any way procure for another alcoholic beverages for the use of an obviously intoxicated person.

Violations of the statute also violate section 409.08(12) of the St. Paul Legislative Code. It states:

No person shall give, sell, procure or purchase intoxicating liquor to or for any person to whom the sale of intoxicating liquor is forbidden by law.

The evidence presented establishes that the Licensee violated the statute and the ordinance. It shows that Patrons 1 and 2 talked in a loud, fragmented, and incoherent manner. It also shows that both slurred their speech and had watery or bloodshot eyes. The evidence also shows that they were heavily consuming alcoholic beverages during the period that City investigators were in the establishment, that Patron 1 had difficulty getting off the bar stool and that Patron 2 was, at one point, falling asleep at the bar and stumbled when he walked. The behavior the three investigators witnessed is persuasive evidence that the two patrons were obviously intoxicated.

In Strand v. City of Watson, 245 Minn. 414, 72 N.W.2d 609 (1955), the court discussed a prior version of the statute prohibiting the sale of liquor to an obviously intoxicated person. It stated, in part, as follows:

The word "intoxicated" is one of those terms used to depict a physical condition which probably defies precise definition. It may have different meanings when used in different statutes or in connection with different situations. The degree of intoxication varies with the amount of alcohol absorbed in the blood stream, and just when the point of absorption is reached, where it can be said that the person is so intoxicated that it is unlawful to sell him more liquor cannot be stated with mathematical certainty. The outward manifestation of intoxication varies with individuals as it does with the physical condition of the individual. * * * As used in

these statutes, the definition used by the trial court probably is as good as any. The court instructed the jury as follows:

“ * * * When any person from the use of intoxicating liquors has affected his reasoning or his faculties, or has rendered himself incoherent of speech, or has caused himself to lose control in any manner to any extent of the actions or motions of his person or body, such person in the contemplation of the law is intoxicated.”

The court went on to state:

* * * Before there can be an illegal sale under § 340.14, the person to whom the sale is made must be intoxicated to such an extent that the seller, using his usual and reasonable powers of observation, sees or should see that the buyer is intoxicated. In other words, there must be such outward manifestation of intoxication, that a person using his reasonable powers of observation can see or should see that such person has become intoxicated.

Strand v. City of Watson, *supra*, 72 N.W.2d at 615.

The conclusion that Patrons 1 and 2 were intoxicated when last served alcoholic beverages by the Licensee's bartender is supported by their conduct, by the fact that they either consumed or ordered three drinks during the short time the investigators were on the premises, the fact that they had been present prior to the investigators' arrival, the Licensee's failure to present any conflicting testimony tending to show the absence of a violation, and the opinions of the City's three witnesses.

II.

The Licensee argued, however, that the procedures followed by the three investigators were inappropriate from a policy standpoint and deprived the Licensee of a fair opportunity to present a defense. First, the Licensee argued that if the investigators believed that the two patrons were obviously intoxicated, they should have informed the bartender of their conclusion and instructed the bartender to stop serving them. In the Licensee's view, such a procedure is in the best interest of the public, the Licensee, and the patrons themselves. Second, the Licensee argued that when it is not advised of a violation at the time the violation is observed, it is unable to present a defense because its personnel likely will not recall the circumstances or the patrons involved. Those arguments have some merit. In the administrative penalty context, administrative officers who observe statute or rule violations normally notify the Licensee or regulated party of the violations and their intention to issue a penalty order. This is clearly done so that hazardous activities are stopped and to alert the Licensee so that it is in a position to recall relevant events, make notes and preserve evidence necessary to defend itself in subsequent proceedings. In this proceeding, for example, the Licensee received no notice of the violation until approximately two weeks after it occurred.

As a matter of policy, the Administrative Law Judge recommends that LIEP staff who witness violations of sections 340A.502 during the course of inspections promptly advise the licensee of the violation and of the staff's intention to take adverse administrative licensing action. By so doing, the licensee will be able to recall relevant

events and they more likely will be able to identify the purchasers who allegedly were intoxicated and summon them as witnesses if needed. Furthermore, once put on notice, sales to the purchasers will likely stop. This is beneficial to the purchasers and enhances public safety.

In most administrative settings, agency personnel who discover violations of laws and rules promptly identify the offending party of the violations observed and of the agency official's likely issuance of an administrative penalty order of some nature. This is the standard practice followed, for example, by the Department of Health in investigating nursing homes and by the agencies responsible for occupational safety and health. Although it is fairer to bring statutory violations to a licensee's attention at the time the violations occur, the Administrative Law Judge is not persuaded that the City's failure to give prompt notice of the violations or identify, by name, the patrons involved violated the Licensee's due process rights or require dismissal of the charges in this proceeding. The Licensee cited no authority supporting either requirement and the Judge could find none. Assuming that an intoxicated patron's identity was known, but the patron died before trial, the Judge is not persuaded the prosecution would be barred. Where the patron's identity is unknown, the same conclusion is apt.

In a criminal context, due process protects against prosecutorial delays planned for the purpose of giving a tactical advantage to the prosecution, if such delays result in prejudice. See, e.g., State v. Anderson, 275 N.W.2d 554 (Minn. 1978). There is no evidence in this case that the City failed to issue its penalty order before it did for the deliberate purpose of gaining a tactical advantage. Furthermore, there is no evidence that the City's failure to give prompt notice prejudiced the Licensee. The Licensee's part-owner, Louis A. Lentsch, suggested that his bartender could not recall pertinent facts regarding the incident because two weeks elapsed between the time it allegedly occurred and the time when the Licensee received notice of adverse action. That argument is unpersuasive and must be rejected. First, the bartender, who was present at the hearing, never testified, and Mr. Lentsch's statements that the bartender was unable to recall pertinent events two weeks after they occurred is, at best, unreliable hearsay of a completely self-serving nature. There is, in fact, no specific, reliable evidence indicating that the Licensee's bartender could not recall relevant events, recall the identities of the patrons involved, or present a meaningful defense.

It is important to know the identities of the persons who were intoxicated so that the Licensee can present a meaningful defense, prepare for trial, and avoid a second penalty for the same offense. However, the Licensee failed to show that the evidence presented regarding the time and place of the violation and the description of the intoxicated persons was inadequate to identify the patrons or present a meaningful defense.

Even if it were assumed that the City was required, as matter of due process, to disclose the identities of the two persons who were allegedly intoxicated when served alcoholic beverages by the Licensee's bartender, that requirement would only come into play if the patrons' identities are unknown. There is no credible evidence in the record that the Licensee's bartender didn't know the two patrons involved in the charge. The Licensee simply failed to establish a due process violation.

III.

Under the St. Paul legislative code, the City is authorized in section 310.05(k) to require a license in a case like this to pay all of the costs of a contested case hearing. The decision to impose those costs is discretionary with the City Council. In determining whether to exercise its discretion, the Administrative Law Judge is persuaded that the Council should consider, among other things, the legitimacy of the defenses asserted by the Licensee. In this case, the Licensee raised a legitimate due process and policy issues relating to the issuance of penalty notices after violations are observed. Although the Licensee did not cite any authorities supporting its position, there are legitimate due process concerns which could, in other cases, lead to a different result. Because the Council now has an opportunity to address the procedures followed by LIEP staff and policy changes that could be beneficial to public health and safety, the Administrative Law Judge is persuaded that the Council should not, in this case, require the Licensee to pay the costs of the proceeding.

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